STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 155245

ELISAH KYLE THOMAS,

Defendant-Appellant.

Court of Appeals No. 326311
Lower Court No. 14-009512-01-FC

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF
BY DIRECTION OF THE COURT'S ORDER OF JUNE 7, 2017

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

The Court has jurisdiction over defendant's appeal from the Court of Appeals' decision reversing the circuit court's order suppressing the identification evidence.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

Only an identification procedure that is both unnecessary and so suggestive as to render the identification unreliable violates due process. The police found defendant, who fit the description of the shooter, in the area of the shooting immediately after the victim had been transported to the hospital, and within an hour of the shooting, showed the victim a photograph of defendant taken by an officer on her cell phone because no other photos of him were available. Did the circuit court clearly err in suppressing the victim's identification of defendant where the photo showup was necessary to determine whether defendant was the perpetrator or the police needed to continue the investigation, and the resulting identification was reliable?

The People answer: Yes
Defendant answers: No
The Court of Appeals answered: Yes
The Circuit Court answered: No.

II.

The suppression of a pretrial identification does not bar a witness from identifying the defendant in court if the witness has an independent basis for that identification. The victim saw defendant earlier on the night of the shooting, stood face-to-face with him half an arm-length away during the shooting, and accurately described him to the police before being transported to the hospital and again at the hospital, less than one hour after the shooting. Did the circuit court clearly err in suppressing the victim's in-court identification of defendant where the victim had an independent basis for that identification?

The People answer: Yes
Defendant answers: No.
The Court of Appeals did not address the issue.
The Circuit Court answered: No.

COUNTER-STATEMENT OF FACTS

Dwight Dykes identified defendant Elisah Kyle Thomas as the man who shot him on October 17, 2014. Defendant attempted to rob the victim at 8:30 or 9:00 that night, and shot the victim when the victim did not give him anything. 1/30/15, 4-5, 13. The victim saw defendant for six or seven seconds at a distance of about half an arm-length away. Although it was dark, he could see defendant's face from his forehead to his chin, and had no problem seeing defendant's eyes, nose and mouth. 1/30/15, 4-6, 15. The victim's focus was on defendant's face, not the gun defendant held. 1/30/15, 17.

This was not the first time the victim had seen defendant that night. About ten minutes earlier, the victim had walked by defendant as the victim approached a restaurant, where the victim was meeting an employee to pay him money owed. On that occasion, the victim saw defendant for approximately three seconds. It was dark out, but the victim could see defendant's face from his eyebrows to his chin. Defendant was wearing the same clothing that he wore at the time of the shooting. 1/30/15, 6-8, 12-13, 19-20.

After being shot, the victim ran to his nearby church, where his pastor called the police. An ambulance quickly arrived and the victim was taken to the hospital. 1/30/15, 8, 21. In the ambulance, he provided the police with a description of his assailant. He described the shooter as approximately his height and weight (5'9", 145 lbs), with dark skin, and wearing a black hood. 1/30/15, 22-23. At an evidentiary hearing, the victim testified that defendant had facial hair. Although the victim had testified previously that he was not sure whether defendant had facial hair, he explained at the hearing that defendant had "peach fuzz." 1/30/15, 14-15, 19.

Officer Samellia Howell arrived on the scene as the victim was being loaded into the ambulance near a church approximately one-half block from the location of the shooting. After receiving the description of the shooter, she canvassed the area. She then saw defendant, who matched the description. She stopped him and patted him down. He provided his name and she ran it through the LEIN.[1] On learning that defendant had no warrants or convictions, she recorded his information and took his photograph in front of a Mobil gas station. 1/30/15, 24-29, 47-48. She estimated that she took the photograph five or ten minutes after the shooting. 1/30/15, 38. Officer Howell did not have probable cause to arrest defendant and mistakenly thought she could not bring him to the hospital without probable cause.[2] 1/30/15, 35-37.

Officer Howell estimated that it took her five minutes to get to the hospital and that it was another two or three minutes before she saw the victim. The victim provided a description of the shooter that matched defendant, including stating that he had seen him before in the neighborhood and describing him as between fifteen and twenty years old, standing 5'9" tall[3] and weighing 200 pounds. 1/30/15, 30-32, 39-40, 45-46. Officer Howell decided to show the victim

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[1] Law Enforcement Information Network.

[2] Officer Howell was mistaken in believing that probable cause was required to bring defendant to the hospital. Reasonable suspicion, not probable cause, is required to detain a suspect for purposes of an on-the-scene or near-the-scene showup identification. *Comm v Phillips*, 452 Mass 617, 626; 897 NE2d 31 (Mass, 2008); *Comm v Barros*, 425 Mass 572, 584-585; 682 NE2d 849 (Mass, 1997); see generally *People v Custer*, 465 Mich 319, 326-327; 630 NW2d 870 (2001) (a detention of a person for purposes of investigating criminal behavior based on reasonable suspicion does not violate the Fourth Amendment).

[3] Defendant is 5'8" or 5'9" tall. 1/30/15, 65.

the only available photograph of defendant.[4] She told the victim she was going to show him a picture, and then showed him defendant's photo on her phone[5] and asked, "Was this him?" Within seconds, the victim began crying and stated, "That's him." 1/30/15, 31-34, 39-41. According to Officer Howell, the time from her arrival at the crime scene until the victim's identification of defendant was between fifteen and twenty minutes. 1/30, 35.

The victim similarly testified that he spoke to an officer within five or ten minutes of his arrival at the hospital, even before a doctor had examined him. 1/30/15, 8-9. The officer showed him a photo[6] on the officer's cell phone and asked if it was the person who had shot him. He was not told he had to pick the person or that it may not be the person. He recognized the face as defendant, the person who shot him. 1/30/15, 10-12, 17.

The People charged defendant with armed robbery, assault with intent to murder, assault with intent to do great bodily harm less than murder, carrying a concealed weapon, carrying a weapon with unlawful intent, and felony-firearm.[7] On October 31, 2014, the district court bound over defendant to circuit court as charged. 10/31/14, 18.

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[4] Even if a mugshot of defendant had existed, Investigator Glenda Fisher explained that mugshots are not accessible from the LEIN, and an officer cannot obtain them while in a scout car. Officers can use driver's license photos in a photo array, but she prefers not to because they have a different background, which causes the photos to stand out. Moreover, with mugshots, the police have a computer system that retrieves similar photos for the array, whereas there is no such system for driver's license photos. 1/30, 53-58, 63. Investigator Fisher also explained that the police cannot force a suspect who has not been arrested to participate in a lineup. She added that while the police could arrange to drive a victim by a suspect, it is not frequently done. 1/30/15, 58-5.

[5] Officer Howell's phone was an iPhone 4, which she estimated had a 4-inch screen. 1/30/15, 32.

[6] A printed copy of the photo was admitted as Exhibit 1.

[7] MCL 750.83; MCL 750.84; MCL 750.226; MCL 750.227; MCL 750.227b; MCL 750.529.

Defendant moved to suppress the identification, arguing that "the photo show-up procedure was unnecessarily suggestive and conductive to irreparable mistaken identification."[8] The People opposed the motion, arguing that the identification procedure was the functional equivalent of a permissible on-scene showup procedure. The hospitalized victim could not have been brought to the scene to identify defendant, and practicality and common sense dictated the taking of a photograph of defendant rather than his detention and transport to the hospital for a showup.[9] In reply, defendant argued that the use of the cell phone photo was impermissible and that an evidentiary hearing was necessary to determine the lawfulness of identification procedures used.[10]

The circuit court granted the request for an evidentiary hearing. 1/16/15, 11-12.

The victim, Officer Howell, and Investigator Fisher testified at a hearing held on January 30, 2015. The preceding facts reflect the testimony from the hearing.

The court granted defendant's motion in an opinion and order entered on February 6, 2015. After reciting the facts and summarizing the standard for reviewing identification procedures, the court rejected the People's argument that the photo procedure used was the equivalent of the one-person showup permitted by *Stovall v Denno*[11]:

> In the case at hand, however, the People do not cite to any case law that explicitly equates a photographic identification with a "showup", and this court declines to do so in the absence of precedent. Additionally, this case does not

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[8] Motion to Suppress Identification, ¶ 2.

[9] People's Brief in Support of Response to Defendant's Request for *Wade* Hearing, p 3.

[10] Defendant's Reply to People's Response to Defendant's Request for *Wade* Hearing, pp 2-3.

[11] *Stovall v Denno*, 388 US 293; 87 S Ct 1967; 18 L Ed 2d 1199 (1967).

> present the mortal exigency critical to the analysis in *Stovall*. Further, after extensive review of the law on identification procedures, this court is unable to find any support for the proposition that temporal proximity between the crime and the exhibition of a single photograph, by itself, overcomes the constitutional infirmity of impermissible suggestiveness.

The court then distinguished other cases relied on by the People, and held that "based on the totality of the circumstances in this case and the well developed skepticism surrounding single photograph identification in the applicable case law, the showing of a single photograph of the defendant to Mr. Dykes was so impermissibly suggestive that it violated Mr. Thomas' right to due process."

Turning to the question whether the victim had an independent basis to identify defendant in court, the court concluded that the People had not shown an independent basis by clear and convincing evidence. The court reasoned: "The assault happened quickly, in the dark, by an unknown person whose description by Mr. Dykes shifted subtly between the preliminary examination and the evidentiary hearing.[12] Further, the description provided to Officer Howell could have described many young men in the area where Mr. Thomas was spotted and photographed."

On February 10, 2015, the court dismissed the case on defendant's motion. 2/10/15, 4.

Upon plenary review, the Court of Appeals reversed the decision of the trial court.[13] The Court considered all the circumstances surrounding the identification and determined that the identification procedure was not impermissibly suggestive. The Court also reasoned that the

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[12] The court appears to be referencing the victim's testimony regarding whether his assailant had facial hair.

[13] *People v Elisah Kyle Thomas*, unpublished opinion of the Court of Appeals, issued December 8, 2016 (Docket No. 326311).

showing of the single photo was comparable to a permissible on-the-scene identification. Judge Shapiro concluded otherwise and dissented.

Defendant appealed, and on June 7, 2017, the Court directed the Clerk to schedule oral argument on whether to grant the application or take other action. The Court also directed the parties to file supplemental brief within 42 days[14] addressing: "(1) whether the single photographic identification method used in this case was so impermissibly suggestive that it gave rise to a substantial likelihood of misidentification; and (2) if so, whether the complainant's in-court identification had an independent basis so that it was not subject to suppression."

[14] On July 12, 2017, the Court granted the People's motion for a 28-day extension of the time within which to file the People's brief.

ARGUMENT

I

Only an identification procedure that is both unnecessary and so suggestive as to render the identification unreliable violates due process. The police found defendant, who fit the description of the shooter, in the area of the shooting after the victim had been transported to the hospital, and within an hour of the shooting, showed the victim a photograph of defendant taken by an officer on her cell phone because no other photos of him were available. The circuit court clearly erred in suppressing the victim's identification of defendant where the photo showup was necessary to determine whether defendant was the perpetrator or the police needed to continue the investigation, and the resulting identification was reliable.

Standard of Review

The Court ordinarily reviews a trial court's decision to suppress identification evidence for clear error, which it finds if it is left with a definite and firm conviction that a mistake has been made.[15] But to the extent a ruling turns on questions of law, it is reviewed de novo.[16]

Discussion

This case presents the question whether the police may show a victim a suspect's photograph in lieu of transporting the suspect to the hospital for an identification by the victim within an hour of having been shot. The circuit court held that the police could not, essentially holding that the use of a single photograph in an identification procedure always violates due process. But in so holding, the court failed to recognize that the procedure's mere suggestiveness, by itself, does not violate a defendant's constitutional rights. The procedure

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[15] *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

[16] *People v Hall*, 499 Mich 446, 451-452; 884 NW2d 561 (2016).

must be *unnecessarily* suggestive, and suggestive procedures sometimes are necessary to further an investigation and protect both public safety and a suspect's rights.

Michigan courts long have recognized that on-the-scene and hospital showups in the immediate aftermath of a crime are constitutionally permissible, despite the suggestiveness inherent in a one-person identification procedure. The suggestiveness does not differ when a photograph is used instead of a corporeal identification. Because the Constitution does not prefer corporeal to photo identification procedures, a single-photo showup in lieu of a live showup does not violate due process.

The single-photo showup identification procedure employed in this case therefore was not unnecessarily suggestive. Further, even if the suggestive showup procedure is deemed unnecessary, suppression is not required because no substantial likelihood of misidentification exists. The victim saw defendant twice on the night of the shooting, and was face-to-face with him during the shooting and attempted robbery. His focus was on defendant's face, and he accurately described him to the police. The victim then immediately identified defendant as his assailant when viewing defendant's photograph within one hour of the shooting. The Court of Appeals correctly held that the identification was reliable and therefore admissible.

An Identification Procedure Must Be Both Suggestive and Unnecessary to Violate Due Process

Michigan courts often have stated that an identification procedure violates due process when it is so impermissibly suggestive that it gives rise to a substantial likelihood of

misidentification.[17] In applying that test to corporeal lineups,[18] photo arrays,[19] and single-photo showups conducted well after the crime at a time when an array could have been used,[20] courts understandably focus on the suggestiveness of the procedure rather than determining whether that suggestiveness was unnecessary. The United States Supreme Court, however, has held that unquestionably suggestive identification procedures may be necessary, and, when necessary, the use of those procedures do not violate due process.[21]

Five years ago, in *Perry v New Hampshire*,[22] the Supreme Court clarified that "due process concerns arise only when law enforcement officers use an identification procedure that is *both suggestive and unnecessary*." But even when the police use such a procedure, suppression

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[17] E.g. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998); *People v Hornsby,* 251 Mich App 462, 465; 650 NW2d 462 (2002).

[18] See *People v McDade*, 301 Mich App 343; 836 NW2d 266 (2013) (corporeal lineup).

[19] See *Kurylczyk*, 443 Mich 289 (photo array).

[20] See *Gray*, 457 Mich at 109-110 (use of a single photo showup after the victim tentatively identified defendant in a corporeal lineup).

[21] The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." US Const, Am 14. The Michigan Constitution contains identical language, providing that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. The Due Process Clause of the Michigan Constitution must be interpreted coextensive with that of the federal constitution. "Absent definitive differences in the text of the state and federal provision, common-law history that dictates different treatment, or other matters of particular state or local interest, courts should reject the 'unprincipled creation of state constitutional rights that exceed their federal counterparts.'" *People v Sierb*, 456 Mich 519, 523; 581 NW2d 219 (1998), quoting *Sitz v Dept of State Police*, 443 Mich 744, 763; 506 NW2d 209 (1993).

[22] *Perry v New Hampshire*, 565 US 228, 238-239; 132 S Ct 716, 724; 181 L Ed 2d 694 (2012) (emphasis added).

is not the inevitable consequence.[23] The Due Process Clause instead "requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.'"[24]

These principles are evident in the Supreme Court's consideration of due process challenges to one-person showups and single-photo identification procedures. In *Stovall v Denno*,[25] the United States Supreme Court held that a one-person showup identification procedure did not violate due process because it was necessary. In that case, the defendant stabbed one victim to death during a home invasion and stabbed another eleven times. The police arrested the defendant the next day, and the following day brought him to the surviving victim's hospital room, where the police asked the victim whether defendant "was the man" and had the defendant say a few words for voice identification. Addressing whether the confrontation was "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny the defendant due process of law, the Court reviewed the circumstances surrounding the confrontation to determine whether it violated due process. The Court recognized that an "immediate hospital confrontation was imperative" in *Stovall*. Adopting the reasoning of the lower court, the Supreme Court explained that only the victim could exonerate the defendant, no one knew how long she might live, and she could not visit the jail for a lineup. The Court concluded that the only feasible procedure was to take the defendant to the hospital.[26]

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[23] *Id.* at 239.

[24] *Id.*

[25] *Stovall v Denno*, 388 US 293; 87 S Ct 1967; 18 L Ed 2d 1199 (1967).

[26] *Id.* at 302.

Subsequently, in *Neil v Biggers*,[27] the Supreme Court considered a one-person showup conducted seven months after a sexual assault. The police resorted to the showup because no suitable lineup could be conducted due to the absence of anyone at the jail or juvenile facility who fit the defendant's description. Clarifying its prior decisions, the Court explained that "[s]uggestive confrontations are disapproved because they increase the likelihood of misidentification, and *unnecessarily suggestive* ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But as *Stovall* makes clear, the admission of evidence of a one-person showup without more does not violate due process."[28]

Biggers considered the "totality of the circumstances" in determining whether the one-person showup was reliable. The trial court had, the Court observed, focused unduly on the relative reliability of a lineup as opposed to a showup.[29] The Supreme Court instead analyzed the totality of the circumstances surrounding the identification. Among the factors considered were "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."[30] The Court, on consideration of those factors, determined that there was no

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[27] *Neil v Biggers*, 409 US 188; 93 S Ct 375; 34 L Ed 2d 401 (1972).

[28] *Id*. at 198 (emphasis added).

[29] *Id.* at 200.

[30] *Id.* at 199-200.

substantial likelihood of misidentification, despite the identification procedure taking place seven months after the sexual assault.[31]

Five years later, the Court considered a single-photo identification procedure in *Manson v Brathwaite*.[32] The Court characterized *Biggers* as standing for the proposition that "[t]he admission of testimony concerning a *suggestive and unnecessary* identification procedure does not violate due process as long as the identification possesses sufficient aspects of reliability."[33] In *Brathwaite*, an undercover police officer had purchased narcotics from the occupant of an apartment. Two days later, the officer viewed a photograph left on his desk by another officer and identified the defendant as the seller. The prosecutor conceded that the photo procedure was suggestive and unnecessary because no emergency or exigent circumstances existed.

Brathwaite held that reliability is the "linchpin" in determining admissibility of identification testimony, and that when the police employ a suggestive and unnecessary procedure, the court considers the totality of the circumstances as outlined in *Biggers* in making the reliability determination.[34] On analysis of those factors, the *Brathwaite* Court concluded that the officer's ability to make an accurate identification was not outweighed by the effect of the challenged procedure. Because the Court could not say that there was "a very substantial likelihood of irreparable misidentification," the evidence was for the jury to weigh.[35] The Court

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[31] *Id.* at 200-201.

[32] *Manson v Brathwaite*, 432 US 98; 97 S Ct 2243; 53 L Ed 2d 140 (1977).

[33] *Id*. at 106 (emphasis added).

[34] *Id.* at 114.

[35] *Id.* at 116.

added: "We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature."[36]

Stovall, *Biggers* and *Brathwaite* make clear that to violate due process, an identification procedure must not only be suggestive but also must be unnecessary. And, even when such a procedure is used, suppression is not the inevitable consequence. Only when the suggestive and unnecessary identification procedure creates a very substantial likelihood of misidentification would evidence gained from that procedure be barred. The totality of the circumstances surrounding the identification must be considered in determining whether a substantial likelihood of misidentification was present.

Showup Identification Procedures in the Immediate Aftermath of a Crime Are Necessary and the Resulting Identifications Do Not Violate Due Process.

Courts across the county routinely hold that prompt on-the-scene or hospital showup identification procedures generally do not offend due process.[37] Indeed, even courts that have

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[36] *Id.*

[37] See e.g. *United States v King*, 148 F3d 968 (CA 8, 1998) (absent special elements of unfairness, on-the-scene confrontations do not entail due process violations); *United States v Nelson*, 931 F Supp 194, 198 (WD NY, 1996) ("Courts have time and again approved on-the-scene showups, occurring reasonably soon after the crime, as one of the best ways not only to catch the criminal but also to exonerate the innocent"); *Summitt v Bordenkircher*, 608 F2d 247 (CA 6, 1979), aff'd 449 US 341; 101 US 341; 66 L Ed 2d 549 (1981) (hospital showup); *New Jersey v Herrera*, 187 NJ 493, 505; 902 A2d 177 (NJ, 2006) ("We have permitted on or near-the-scene identifications 'because [t]hey are likely to be accurate, taking place, as they do, before memory has faded[] [and because] [t]hey facilitate and enhance fast and effective police action and they tend to avoid or minimize inconvenience and embarrassment to the innocent'"); *Illinois v Lippert*, 89 Ill 2d 171, 188; 432 NE2d 605 (Ill, 1982) ("This court has approved prompt showups near the scene of the crime as acceptable police procedure designed to aid police in determining whether to continue or to end the search for

deviated from the United Supreme Court's test for admissibility of identification evidence have recognized the validity of those procedures when their use is necessary.[38]

Massachusetts courts frequently have considered the issue, and the decisions of those courts are instructive. Consistent with *Perry v New Hampshire*, the Supreme Judicial Court of Massachusetts has held that a showup identification may violate due process when it is "*unnecessarily* suggestive."[39] Only when no "good reason" exists for the police to conduct the showup is it unnecessarily suggestive.[40] Massachusetts courts regularly have concluded "that there is a good reason for a showup identification where an eyewitness is shown a suspect promptly after the commission of the crime."[41] This is because "[n]ot only is a prompt identification procedure more likely to be accurate, because the eyewitness's memory is fresh, but also, more importantly, it allows the police to learn quickly whether the suspect is the perpetrator of the crime so that, if he is not, the police can continue the investigation to find the actual perpetrator."[42] The concern for public safety inherent when investigating assaultive crimes is also important.[43] When a showup procedure is used, suppression is proper only if the police

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the culprits"); *Hobbs v Alabama*, 401 So2d 276, 279 (Ala Crim App, 1981) ("A showup is not inherently unfair, and it is settled law that prompt, on-the-scene confrontations are not constitutionally impermissible, but are consistent with good police work").

[38] See *Young v Alaska*, 374 P3d 395, 421 (Alaska, 2016); *Oregon v Lawson*, 352 Or 724, 742; 291 P3d 673 (Or, 2012); *Wisconsin v Dubose*, 285 Wis 2d 143, 148; 699 NW2d 582 (Wis, 2005).

[39] *Comm v Figueroa,* 468 Mass 204, 217; 9 NE3d 812 (Mass, 2014).

[40] *Id.* at 217.

[41] *Id.*

[42] *Id.*

[43] *Comm v Austin*, 421 Mass 357, 362; 657 NE2d 458 (Mass, 1995).

inject an element of suggestiveness beyond that inherent in the showup. While circumstances surrounding the procedure employed may justify suppression if they "so needlessly add[] to the suggestiveness inherent in such an identification" to render it "conducive to irreparable mistaken identification,"[44] detention of a suspect in a police car, handcuffing the suspect, and flanking the suspect by two police officers have been found not to render the procedure unnecessarily suggestive.[45]

Michigan courts agree, and have long followed United States Supreme Court precedent in considering on-the-scene showups and hospital showups, concluding that even though suggestive, the procedures, when necessary, do not violate due process. Forty-four years ago, this Court recognized the necessity of the procedures in *People v Anderson*.[46] Although the dispositive legal issue in *Anderson* was whether a defendant has a right to counsel at an identification procedure, the Court commented on the propriety of using a photographic identification procedure while the victim of the assault was in the hospital. The Court observed that there was "[n]ecessity for immediate identification since the victim was critically ill in the hospital's intensive care unit and because of the hour and other facts it was not possible to arrange an immediate lineup."[47] Under those circumstances, the Court noted, "even a one-man

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[44] *Figueroa*, 468 Mass at 217, quoting *Comm v Phillips*, 452 Mass 617, 628; 897 NE2d 31 (Mass, 2008).

[45] *Phillips*, 452 Mass at 628.

[46] *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973).

[47] *Id.* at 187.

corporeal confrontation such as used in *Stovall* might be justified, but the better course would be to [f]irst conduct a photographic 'lineup' with a [f]air display of pictures."[48]

Two years after *Anderson*, the Court of Appeals considered a case in which the police apprehended a suspect thirty minutes after a theft at a store and promptly returned him to the store where a salesperson identified him. In *People v Johnson*,[49] the Court deemed the on-the-scene procedure a reasonable police practice and rejected the argument that it was so suggestive as to deny the defendant due process. The Court explained that the practice allows for the confirmation or denial of identification while the witness' memory is still fresh and also allows for the expedited release of an innocent suspect. Possible suggestiveness, the Court reasoned, could be argued by the defendant at trial.[50]

More recently, in *People v Libbett*,[51] the Court of Appeals reviewed a case in which the victim was carjacked by two men whom he described as a tall black man and a short black man. The police located the car approximately one hour later and detained four men after a chase. Two hours after the carjacking, the police transported the victim to two locations where they had detained the suspects. At one location, the victim identified the defendant as the taller man, and at the other, he identified the defendant's cousin as the shorter man. In rejecting the defendant's challenge to the identification procedure, the Court reiterated that on-the-scene confrontations are

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[48] *Id.* at 188.

[49] *People v Johnson,* 59 Mich App 187, 189-190; 229 NW2d 372 (1975).

[50] *Id.* at 190; see also *Watkins v Sowders*, 449 US 341, 347-348; 101 S Ct 654; 66 L Ed 2d 549 (1981) (the proper evaluation of identification evidence under the court's instructions "is the very task our system must assume juries can perform").

[51] *People v Libbett*, 251 Mich App 353; 650 NW2d 407 (2002).

a reasonable and indispensable police practice because "'they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely the unfortunate victim of circumstances.'"[52] They also "promote fairness by assuring greater reliability."[53]

The *Libbett* court reasoned that when "presented with four black males with no greater description than one was taller than the other, it was reasonable for the police to have [the victim] identify whether any of the four individuals were actually the perpetrators." The Court rejected the defendant's attempt to limit on-the-scene identifications to those that take place within minutes of the crime. The Court explained that the police were confronted with the possibility that two of the men were not involved in the crime. It stressed that because the victim had seen the perpetrators just two hours earlier, "their appearance was still fresh in his mind."[54]

Libbett, *Johnson* and *Anderson* demonstrate that in Michigan, as in many other jurisdictions, prompt on-the-scene and hospital showup identification procedures generally do not offend due process. The identification is more accurate, as the victim's or another witness' memory has yet to fade, and a determination whether a suspect is the perpetrator is necessary to protect public safety and potentially exonerate an innocent suspect. While suggestive, the identification procedure, by itself, is not unnecessarily so, and thus does not violate due process.

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[52] *Id.* at 361, quoting *People v Winters*, 225 Mich App 718, 728; 571 NW2d 764 (1997).

[53] *Id.*

[54] *Id.* at 362.

The Single-Photo Showup in this Case Was Necessary and Not Impermissibly Suggestive

The identification procedure in this case, like those in *Johnson* and *Libbett*, was necessary and not impermissibly suggestive. As in *Libbett*, the police had a general description of the perpetrator and a suspect who met that description. The police needed to determine whether defendant was subject to arrest for assault and robbery or whether he himself was merely the unfortunate victim of circumstance, in which event the police would have continued the investigation without undue delay. The police unquestionably could have lawfully brought defendant to the scene of the crime for possible identification by the victim or brought the victim to defendant, had the victim been available for that showup procedure. The victim, however, had been transported to the hospital.

Under these circumstances, the police could have brought defendant to the hospital,[55] although Officer Howell mistakenly thought she could not unless she had probable cause to arrest defendant.[56] Prompt identification, however, was still necessary, especially because the victim had been shot and gunshot wounds may result in death, even when it initially appears the victim will survive. No less suggestive alternative existed to a single-person showup under these circumstances. Since defendant did not have a criminal record, the police could not create a photo array using mugshots. And a photo array using mugshots and a driver's license photo (assuming defendant had one) would have caused defendant's photo to stand out. The police did not have the capability of quickly creating a photo array using only driver's license photos, and

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[55] See *Stovall*, 388 US at 302.

[56] See *Phillips*, 452 Mass at 626 (reasonable suspicion is required for an on-the-scene showup); *Comm v Barros*, 425 Mass 572, 584-585; 682 NE2d 849 (Mass, 1997).

could not have, within an hour of the shooting, located other men who fit the victim's description of the shooter and taken their photographs near the Mobil gas station. The police clearly did not have a feasible alternative to a one-person showup.[57]

The only reasonable alternative to the one-person photo showup—a one-person corporeal showup—would have been an equally suggestive one.[58] In both corporeal and photo showups, the witness views but one person. That the police chose a less intrusive photo identification procedure does not convert an otherwise permissible police practice into a violation of due process. The Constitution does not establish a preference for corporeal identification procedures over the use of photographs.[59] The United States Supreme Court so held in *Simmons v United States*.[60] Although the Court recognized some hazards of identification by photograph, the Court explained that "[t]he danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error." The Court declined to prohibit employment of identification by photograph, either as a constitutional requirement or by means of its

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[57] The police also could have hoped the victim would survive, and possibly waited for the victim's release from the hospital, ascertained defendant's whereabouts in a public place at a particular time, and transported the victim to view defendant. In the meantime, the police would have wasted important time in the investigation, increased the danger to the public, and allowed the victim's memory to fade.

[58] If the Court holds that probable cause would be required to transport defendant to the hospital then a single-photo showup unquestionably was necessary as it was the *only* available procedure to secure a prompt identification.

[59] See *Branch v Estelle*, 631 F2d 1229, 1234 (CA 5, 1980) (a defendant has no constitutional right to a lineup).

[60] *Simmons v United States*, 390 US 377, 384; 88 S Ct 967; 19 L Ed 2d 1247 (1968).

supervisory power. The Court held that "each case must be considered on its own facts," and that the standards set forth in *Stovall* apply.[61]

Granted, this Court once established a preference for corporeal identification procedures over identification by photograph, but the Court since has rejected the rationale of that decision. In determining that suspects who are in police custody had a right to counsel during photo identifications procedures, the Court held in *People v Anderson* that, with some exceptions, "identification by photograph should not be used where the accused is in custody."[62] One year later, in *People v Jackson*, the Court acknowledged that its holding was not based on the Constitution, but rather, on its power to establish rules of evidence.[63]

More recently, however, the Court has rejected *Jackson* and other decisions that broadly characterize the Court's authority over all matters relating to the admission of evidence, and instead distinguished between procedural and substantive rules.[64] The Court also overruled *Anderson*'s holding that the right to counsel attached before the initiation of adversarial judicial proceedings.[65] In *People v Hickman*, the Court explained that "the *Anderson* rules lack a foundation in any constitutional provision, whether state or federal" and instead "reflect the policy preferences of the *Anderson* Court." The Court dismissed the *Jackson* Court's attempt to

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[61] *Id.* at 384.

[62] *Anderson*, 389 Mich at 186-187. As previously noted, one of the exceptions was when the nature of the case requires immediate identification. *Id.* at 186, n 23.

[63] *People v Jackson*, 391 Mich 323, 338; 217 NW2d 22 (1974).

[64] *McDougall v Schanz*, 461 Mich 15, 29; 597 NW2d 148 (1999).

[65] *People v Hickman*, 470 Mich 602, 606; 684 NW2d 267 (2004).

rationalize *Anderson* as an exercise of the Court's authority to promulgate rules of evidence. The *Anderson* rules, the Court observed, encompassed more than purely evidentiary matters.[66]

The photo used in this case, which depicts defendant standing on the street, was the photographic equivalent of a permissible in-person identification at the crime scene or hospital, except that it did not include suggestive features common with in-person showups. Defendant was not handcuffed and was not flanked by police officers, nor was he confined to a police car. The victim also could not observe defendant's facial expressions and gestures, and possibly consider nervousness as an indication of guilt.

That Officer Howell asked the victim whether the photo was of the man who shot him did not render the procedure unnecessarily suggestive. *Stovall* gave no weight to a similar comment, and a victim of a crime normally expects to be viewing a suspect when he or she is shown a photo or presented with a corporeal showup in the immediate aftermath of a crime.[67] The photo showup therefore was not *unnecessarily* suggestive, and as a result, the identification procedure did not violate due process.

Moreover, even if the Court concludes that the procedure was unnecessarily suggestive, the circuit court nevertheless improperly suppressed the victim's identification of defendant. Under *Brathwaite* and *Biggers*, a court must consider the totality of the circumstances in determining whether a very substantial likelihood of misidentification exists. Among the factors considered were "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the

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[66] *Id.* at 606.

[67] *Phillips*, 452 Mass at 628.

level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."[68]

These factors favor admission in this case. Conducting the showup while the victim's memory was still fresh, less than one hour after the assault, increased the reliability of the resulting identification.[69] The victim focused on defendant's face during the assault. The victim stood face-to-face with defendant at a distance of half an arm's length away, and recognized defendant because he had seen defendant's face a few minutes earlier. The victim accurately described defendant both in the ambulance and at the hospital, and on viewing defendant's photograph, began to cry and identified defendant as his assailant. The totality of the circumstances, therefore, demonstrates that a very substantial likelihood of misidentification did not exist. The victim's identification of defendant was reliable and admissible.

Conclusion

The Court of Appeals correctly reversed the circuit court's decision suppressing the victim's identification of defendant. The single photographic identification method used in this case was not impermissibly suggestive and did not give rise to a substantial likelihood of misidentification. The showup occurred within an hour of the shooting, and while suggestive, was necessary to determine whether defendant was the shooter while the assailant's face was still fresh in the hospitalized victim's mind. Because the procedure was not *unnecessarily* suggestive, its use did not violate due process. Further, even if the Court deems the procedure unnecessarily

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[68] *Biggers*, 409 US at 199-200.

[69] *Libbett*, 251 Mich App at 361; *Russell v United States*, 408 F2d 1280, 1284 (CA DC, 1969); *Connecticut v Wooten*, 227 Conn 677, 686-687; 631 A2d 271 (Conn, 1993).

suggestive, the timing of the procedure and the circumstances surrounding the victim's encounter with defendant demonstrate that no substantial likelihood of misidentification exists. The victim's reliable identification of defendant is admissible, and a jury can weigh any suggestive aspects of the showup procedure in determining whether the People have proven beyond a reasonable doubt that defendant shot the victim.

II

The suppression of a pretrial identification does not bar a witness from identifying the defendant in court if the witness has an independent basis for that identification. The victim saw defendant earlier on the night of the shooting, stood face-to-face with him half an arm-length away during the shooting, and accurately described him to the police before being transported to the hospital and again at the hospital, less than one hour after the shooting. The circuit court clearly erred in suppressing the victim's in-court identification of defendant where the victim had an independent basis for that identification.

Standard of Review

The Court reviews a trial court's decision to suppress identification evidence for clear error, which it finds if it is left with a definite and firm conviction that a mistake has been made.[70]

Discussion

The circuit court clearly erred in determining that the victim did not have an independent basis for his in-court identification of defendant. A court must consider the totality of the circumstances in making that determination.[71] Among the factors involved in the inquiry are: (1) the witness' prior relationship with, or knowledge of, the defendant; (2) the witness' opportunity to observe the offense; (3) the length of time between the offense and the disputed identification; (4) accuracy or discrepancies in the witness' description of the person and the defendant's actual description; (5) any previous proper identification or failure to identify the defendant; (6) any prior identification of another person; (7) the nature of the offense and the physical and

[70] *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

[71] *People v Gray,* 457 Mich 107, 115; 577 NW2d 92 (1998).

psychological state of the victim; and (8) any idiosyncratic or special features of the defendant.[72] Not all the factors will always be relevant, and a court may give different weight to particular factors depending on the circumstances of the case.[73]

In this case, the victim unquestionably could see defendant's face during the assault—he stood face-to-face with defendant at a distance of just half an arm's length away. Yet the circuit court surprisingly discounted that vantage point and instead focused on lighting conditions. In doing so, the court failed to recognize that little light is necessary to recognize a person who is facing you one foot away. The court likewise erred in placing heavy emphasis on the amount of time defendant stood in front of the victim and the victim's admission that his adrenalin was up. One need not stare at a person's face for several minutes to recognize that person again. The victim's focus was on defendant's face during the assault, and he had seen defendant a few minutes earlier. A person's face stands out more on second viewing, and in this case, the court erred in failing to give any weight to that prior encounter.

The court then compounded its error by concentrating on whether the victim's description of his assailant could have described other men instead of on whether it described defendant. Not surprisingly, the victim's description of defendant was a general one—he provided that description while suffering from a gunshot wound and waiting for transportation to the hospital and again while awaiting treatment at the hospital. He was not sitting down with a sketch artist who would have asked probing questions about defendant's facial features. While the description may have described other men, it accurately described defendant and the clothing he

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[72] *Id.* at 116.

[73] *Id.* at 117, n 12; see also *People v Kachar,* 400 Mich 78, 95-96; 252 NW2d 807 (1977).

was wearing. To that extent, it favored a finding of an independent basis, and did not weigh against the finding, as the circuit court believed.

In summary, the totality of the circumstances demonstrates that the victim had an independent basis for his in-court identification of defendant. He saw defendant twice that night, and stood face-to-face with him during the shooting. He accurately described defendant in the minutes after the shooting, and the disputed identification occurred within one hour of the crime, not days, weeks or months later when memories might have faded. In testifying at trial, the victim would not be identifying defendant because he saw his photo in the hospital. He would be identifying defendant because he recognized defendant as the man who shot him. The victim's in-court identification had an independent basis such that it was not subject to suppression. The circuit court therefore clearly erred in suppressing the in-court identification.

RELIEF

WHEREFORE, the People request that this Court either affirm the decision of the Court of Appeals or deny defendant's application for leave to appeal.

Respectfully Submitted,

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